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CHEMICAL WATER CONTAMINATION LEADS TO LAWSUITS BUT NO SOLUTION

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Recently, citizens of three townships in Pennsylvania discovered that toxic chemicals had contaminated both their public and private water supplies. Two residents, J. Davy and Josephine Yockey, are suing six major companies that used hazardous chemicals and compounds in their products, which allegedly lead to the water's contamination.[i]

(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/SMiller%20Blog%20Post.docx#_edn1) The plaintiffs are suing individually but have also instituted a class action on behalf of all similarly situated residents.[ii]

(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/SMiller%20Blog%20Post.docx#_edn2) The plaintiffs and members of the class action claim they have been exposed for years to these chemicals at unsafe levels, and since discovery of the contamination in the summer of 2016, they have been forced to buy bottled water for drinking and cooking.[iii]

(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/SMiller%20Blog%20Post.docx#_edn3) Defendants include The 3M Company, The Ansul Company, National Foam, Chemguard, Buckeye Fire Protection, and Angus Fire.[iv]

(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/SMiller%20Blog%20Post.docx#_edn4)

The complaint alleged that the drinking water was contaminated by chemicals and toxic compounds that came from Aqueous Film Forming Foam, which Defendants had manufactured and sold to the U.S. Navy for years.[v]

(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/SMiller%20Blog%20Post.docx#_edn5) Two of these naval bases where the foam was used in firefighting exercises are adjacent to Warminster and Warrington Townships in Bucks County, and Horsham Township in Montgomery County.[vi]

(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/SMiller%20Blog%20Post.docx#_edn6) Defendants' Aqueous Film Forming Foam ("AFFF") contained various perfluoroochemical compounds ("PFCs"), which can cause serious health issues if consumed, including various forms of cancer.[vii]

(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/SMiller%20Blog%20Post.docx#_edn7) The Yockeys explain that in areas surrounding the naval bases, almost all homes supply their

own water via private wells on their property.[viii]

(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/SMiller%20Blog%20Post.docx#_edn8) Because this water is now contaminated, the plaintiffs are concerned both about their health and the decreased value of their properties.[ix]

(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/SMiller%20Blog%20Post.docx#_edn9) Those who have had chronic exposure to PFCs are at a higher risk for bladder or kidney cancer.[x]

(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/SMiller%20Blog%20Post.docx#_edn10) PFC-related health conditions and diseases can lay dormant for months or years following exposure.[xi]

(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/SMiller%20Blog%20Post.docx#_edn11) Plaintiffs are seeking medical monitoring in addition to over \$5 million for the class for damages to their real and personal property resulting from the contaminated drinking water.[xii]

(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/SMiller%20Blog%20Post.docx#_edn12)

The Yockeys are suing on the grounds that Defendant companies knew or should have known “that the chemicals presented an unreasonable risk of personal injury and property damage to the class members.”[xiii]

(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/SMiller%20Blog%20Post.docx#_edn13) Although the dangers and hazardous effect on people and the environment are known, PFCs are commonly used in manufacturing products for purposes of repelling water, oil, and grease.[xiv]

(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/SMiller%20Blog%20Post.docx#_edn14) While the companies should be held liable if they knew the toxicity of their products and gave only limited warnings, the product’s users who disregarded those warnings should be made liable too. The complaint alleges that “[a]t all times relevant hereto, The United States Navy, Air National Guard, Marines and Air Force as well as civilian fire fighters conducted training exercises at The Bases . . . all of which led to the ground, runways and adjacent soil being covered with AFFF and the byproducts of AFFF from runoff.”[xv]

(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/SMiller%20Blog%20Post.docx#_edn15) It further alleged that the AFFF was stored in aircraft hangers on the naval bases, and after accidental discharges of foam, personnel would wash it down the drains.[xvi]

(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/SMiller%20Blog%20Post.docx#_edn16) These uses are the alleged source of the toxic PFCs entering the towns’ groundwater.[xvii]

(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/SMiller%20Blog%20Post.docx#_edn17)

Water pollution occurs when pollutants are discharged into bodies of water, such as lakes and oceans, without having been adequately treated to remove harmful compounds.[xviii]

(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/SMiller%20Blog%20Post.docx#_edn18) Therefore, logic dictates that but-for the U.S. Navy’s negligent use and discharge of the product, the public water supply and private drinking wells would not have been contaminated. While often the source of pollution is difficult to prove, PFCs are a rare compound that will likely be difficult to link to another business in the area.[xix]

(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/SMiller%20Blog%20Post.docx#_edn19) In a system of justice designed to punish wrongdoers and to deter future tortious conduct, we must hold those responsible accountable for helping rectify the situation, even when the offender is the government.

Kristen Giovanni believed so too. Prior to the Yockey’s filing, the Giovanni family filed suit against the U.S. Department of the Navy in Pennsylvania state court.[xx]

(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/SMiller%20Blog%20Post.docx#_edn20) This suit also seeks medical monitoring in addition to conducting a health impact study, pursuant to the state’s Hazardous Sites Cleanup Act.[xxi]

(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/SMiller%20Blog%20Post.docx#_edn21) The U.S. Agency for Toxic Substances and Disease Registry recently released a cancer study indicating “increased rates of certain types of cancers linked with PFCs, but decreased rates of others.”[xxii]

(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/SMiller%20Blog%20Post.docx#_edn22) While this points to negligence by the naval bases, suing the federal government causes issues of sovereign immunity. Because the Giovanni’s brought the claim in a state court, the

government can argue that it is not bound by state statutes.[xxiii]

(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/SMiller%20Blog%20Post.docx#_edn23) While various federal acts waive immunity and allow for suits against the federal government, none of these have been claimed yet. However, there have been other successful suits against the federal government under this state act, so precedent may weigh in the plaintiffs favor when navigating immunity issues.[xxiv]

(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/SMiller%20Blog%20Post.docx#_edn24) Further, the plaintiff's attorney explained that he sued in state court because medical monitoring is not an allowed remedy under federal law.[xxv]

(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/SMiller%20Blog%20Post.docx#_edn25) This reasoning leads to the real issue: although it is good to be able to sue corporations who have wronged us for money, in situations of severe health and environmental concerns, the focus must be on the solution.



How can the Navy, and the defendant companies, rectify the situation? While better warning labels will help users know the hazards of the products they use in the future, these three townships are still without safe drinking water. Plaintiffs in both suits suggested medical monitoring, which has been shown to decrease common risk factors and death from cancer for people affected by known sources of contamination.[xxvi]

(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/SMiller%20Blog%20Post.docx#_edn26) In other cases of known sources of environmental contamination, courts have set radiuses of which participants must have lived in or worked to the contamination source during the period of pollution before it became public knowledge.[xxvii]

(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/SMiller%20Blog%20Post.docx#_edn27) These programs offered a broad range of initial screenings and diagnostic testing, and then re-examinations every few years.[xxviii]

(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/SMiller%20Blog%20Post.docx#_edn28) While the programs offered little follow-up testing for abnormalities, they caught them and referred these participants to their own physicians.[xxix]

(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/SMiller%20Blog%20Post.docx#_edn29) In at least one large case of uranium contamination, some funds were set aside for follow-up testing for those who couldn't afford to arrange it.[xxx]

(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/SMiller%20Blog%20Post.docx#_edn30)

While the Navy has already shot down Pennsylvania Governor Tom Wolf's request to pay for blood-testing of residents in contaminated areas, hopefully the courts will require defendants to cover the medical testing. [xxxi]

(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/SMiller%20Blog%20Post.docx#_edn31) One Pennsylvania State Representative even suggested the state suing the U.S. Navy "might be necessary in order to force the federal government to begin remediation measures." [xxxii]

(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/SMiller%20Blog%20Post.docx#_edn32)

In addition to the defendant companies and U.S. Navy footing the bill for medical monitoring to catch future problems, the water must still be sterilized to solve today's problem. As of late October, sixteen municipal wells and 150 private wells in the three townships had been shut down.[xxxiii] (file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/SMiller%20Blog%20Post.docx#_edn33) Thus far, the Navy has agreed to fund the cost for carbon filtration of contaminated wells. [xxxiv] (file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/SMiller%20Blog%20Post.docx#_edn34) While homeowners can disinfect private wells themselves from regular microbial contamination,[xxxv] (file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/SMiller%20Blog%20Post.docx#_edn35) chemical contamination of public and private groundwater requires a unified sanitization. A study by the New Jersey Drinking Water Quality Institute Treatment Subcommittee recommended using granulated activated carbon ("GAC") for treatment of PFCs.[xxxvi] (file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/SMiller%20Blog%20Post.docx#_edn36) Studies show that this method, especially using a dual filter design, has been very effective for high concentrations of PFOA and PFOS, the two PFCs in the Pennsylvania contaminated water. [xxxvii] (file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/SMiller%20Blog%20Post.docx#_edn37) However it does require large costs associated with it. In Minnesota, a facility cost approximately \$3 million to construct and \$25,000 a year to operate, in addition to costs of carbon to keep the water filtered; in New Jersey construction of a new treatment facility cost \$12.2 million, with annual operating costs of \$80,000 plus carbon.[xxxviii] (file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/SMiller%20Blog%20Post.docx#_edn38)

Consequently, there is no clear solution to the unfortunate PFC contamination. With many options and no easy path, it is hard to predict how Pennsylvania and the courts will solve this problem. Hopefully companies will learn from these mistakes and science presents a solution to chemical contaminations soon.

[i] (file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/SMiller%20Blog%20Post.docx#_ednref1) Complaint at 1, *Yockey v. 3M Co.*, No. 2:16-cv-05553-PBT (E.D. Pa. Oct. 24, 2016), ECF No. 1.

[ii] (file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/SMiller%20Blog%20Post.docx#_ednref2) *Id.*

[iii] (file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/SMiller%20Blog%20Post.docx#_ednref3) *Id.* at 3.

[iv] (file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/SMiller%20Blog%20Post.docx#_ednref4) *Id.* at 1.

[v] (file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/SMiller%20Blog%20Post.docx#_ednref5) *Id.* at 1-2.

[vi] (file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/SMiller%20Blog%20Post.docx#_ednref6) *Id.* at 2, 7.

[vii]
(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/SMiller%20Blog%20Post.docx#_ednref7) *Id.* at 2-3. 6.

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(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/SMiller%20Blog%20Post.docx#_ednref8) *Id.* at 2.

[ix]
(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/SMiller%20Blog%20Post.docx#_ednref9) *Id.* at 2-3.

[x]
(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/SMiller%20Blog%20Post.docx#_ednref10) *Id.* at 6.

[xi]
(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/SMiller%20Blog%20Post.docx#_ednref11) *Id.*

[xii]
(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/SMiller%20Blog%20Post.docx#_ednref12) *Id.* at 1-2, 5.

[xiii]
(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/SMiller%20Blog%20Post.docx#_ednref13) *Id.* at 3.

[xiv]
(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/SMiller%20Blog%20Post.docx#_ednref14) *Id.* at 6-7.

[xv]
(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/SMiller%20Blog%20Post.docx#_ednref15) *Id.* at 7.

[xvi]
(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/SMiller%20Blog%20Post.docx#_ednref16) *Id.*

[xvii]
(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/SMiller%20Blog%20Post.docx#_ednref17) *Id.*

[xviii]
(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/SMiller%20Blog%20Post.docx#_ednref18) Siddharth Charaya, *Pollution*, BlogSpot (June 29, 2014), <http://siddharthcharaya.blogspot.com/>.

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(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/SMiller%20Blog%20Post.docx#_ednref19) Matt Fair, *Residents Face Uphill Fight In Pa. Navy Contamination Suits*, Law360 (Aug. 29, 2016), <http://www.law360.com/articles/833700/residents-face-uphill-fight-in-pa-navy-contamination-suits>.

[xx]
(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/SMiller%20Blog%20Post.docx#_ednref20) Matt Fair, *US Navy Hit With First Suit Over Pa. Base Contamination*, Law360 (Aug. 24, 2016), <https://www-law360-com.ezproxy.law.uky.edu/articles/832099/us-navy-hit-with-first-suit-over-pa-base-contamination>.

[xxi]
(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/SMiller%20Blog%20Post.docx#_ednref21) *Id.*

[xxii]

(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/SMiller%20Blog%20Post.docx#_ednref22) Fair, *supra* note xix.

[xxiii]

(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/SMiller%20Blog%20Post.docx#_ednref23) *Id.*

[xxiv]

(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/SMiller%20Blog%20Post.docx#_ednref24) *Id.*

[xxv]

(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/SMiller%20Blog%20Post.docx#_ednref25) *Id.*

[xxvi]

(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/SMiller%20Blog%20Post.docx#_ednref26) Robert Wones et al., *Medical Monitoring: A Beneficial Remedy for Residents Living Near an Environmental Hazard Site*, US National Library of Medicine- National Institutes of Health, National Center for Biotechnology Information (Dec. 2009), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2868344/>.

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(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/SMiller%20Blog%20Post.docx#_ednref27) *Id.*

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(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/SMiller%20Blog%20Post.docx#_ednref28) *Id.*

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(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/SMiller%20Blog%20Post.docx#_ednref29) *Id.*

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(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/SMiller%20Blog%20Post.docx#_ednref30) *Id.*

[xxxi]

(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/SMiller%20Blog%20Post.docx#_ednref31) Kat Greene, *3M Among Cos. Sued Over Water Contamination*, Law360 (Oct. 25, 2016), <http://www.law360.com.ezproxy.law.uky.edu/articles/855452/3m-among-cos-sued-over-water-contamination>.

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(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/SMiller%20Blog%20Post.docx#_ednref32) Matt Fair, *Pu. State Rep. Calls For Suit Over Navy Base Contamination*, Law360 (Aug. 23, 2016), <https://www-law360-com.ezproxy.law.uky.edu/articles/831624>.

[xxxiii]

(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/SMiller%20Blog%20Post.docx#_ednref33) Greene, *supra* note xxxi.

[xxxiv]

(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/SMiller%20Blog%20Post.docx#_ednref34) *Id.*

[xxxv]

(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/SMiller%20Blog%20Post.docx#_ednref35) *Disinfecting Private Wells*, Water Quality and Health Council, http://www.waterandhealth.org/newsletter/private_wells.html (last visited Nov. 20, 2016).

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on Perfluorinated Compound Treatment Options for Drinking Water , State of New Jersey 2 (June 2015), <http://www.nj.gov/dep/watersupply/pdf/pfna-pfc-treatment.pdf>.

[xxxvii]
(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/SMiller%20Blog%20Post.docx#_ednref37) *Id.* at 4-5.

[xxxviii]
(file:///C:/Users/Evan/Documents/KJournal/2016%20blogs/Blogs/SMiller%20Blog%20Post.docx#_ednref38) *Id.* at 5.

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